



THE NAVAJO NATION

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Navajo Supreme Court orders election of 24 delegates to proceed, declares Council's Fundamental Law repeal, President's leave illegal

Cites Navajo Nation Council's broken promise to the People to be responsible, accountable

WINDOW ROCK, Ariz. – The Navajo Nation Supreme Court on May 28 ruled in two cases that:

- A Navajo Nation Council of 24 delegates will be seated on Jan. 11, 2011.
- The Council's January legislation to deny the use of *Diné* Fundamental Law by Navajo courts is invalid, and
- The Council's placement of Navajo Nation President Joe Shirley, Jr., on administrative leave in October 2009 was both illegal and "the shabbiest of shabby treatments of the President."

The Court also said it was "startled" and "amazed" that the Council and its non-Navajo attorneys would suggest in oral and written arguments that the Navajo government was not indigenous but merely a borrowed form of government.

In *Shirley v. Morgan*, the Court ruled that:

- The legislation placing the President on administrative leave was invalid.
- The legislation to prevent the Navajo courts from interpreting *Diné* Fundamental Law is invalid.
- *Diné* Fundamental Law is immutable as given to the *Diné* by the Holy Ones, and may not be "enacted" or changed by the Council.
- Navajo sovereignty is based on unwritten Fundamental Laws that form the very foundation of who the *Diné* are.
- Navajo courts will remain independent decision-makers, and the Council may not insulate nor exclude any statute, policy or regulation from judicial review.
- The Council may not encroach upon the independence of the Judicial Branch.

- The encroachment by one branch of Navajo government into the essential powers of another for any reason is impermissible.

"We affirm today that the Council may not use its power to frustrate the will of the People."

– Navajo Nation Supreme Court
Nelson v. Initiative Committee, May 28, 2010

- The People have the power to choose their form of government and to choose their own leaders.
- Laws passed by the Council must be clear so they may be understood, and one part may not conflict with another.
- The principles of separation of powers and checks and balances among branches of government will be respected and may not be abridged by the Council.
- Sovereign immunity may not be used to prevent one branch of government from suing another.
- The Council has recognized that the Navajo government is in the hands of the People and it will look to the People to guide it.
- If the Council refuses to act upon its promises to the People, it is not inappropriate for another entity to press the People's interests and hold the Council to its promises.

In *Nelson v. Initiative Petition Committee*, the Court ruled that:

- The Navajo Board of Election Supervisors shall immediately certify the Dec. 15, 2009, special election results.

- President Shirley may exercise line item veto authority that was approved by voters.

- President Shirley shall present the reapportionment plan that has been prepared by June 11.

- NBOES shall approve the reapportionment plan by June 18.

- The Navajo Election Administration may resume the candidate filing process which will end June 11.

- NEA will complete candidacy certification by June 12.

- The Navajo Nation primary election will occur on Aug. 3 and the general election will occur on Nov. 2 as scheduled.

- The supermajority vote requirement of Title 2 Sec. 102 (A) does not apply to an initiative election.

- The section of Title 11 that permits the Council to override an initiative by a three-fourth vote is invalid.

- The Navajo People have a right to determine the structure of their own government because powers not authorized to the Council are reserved to the People, and

- Laws that conflict with promises made to the People by the Council cannot stand, and the Council must defer to the will of the People.

The Court found that the Council had broken its promise to the Navajo People by not allowing the People to vote on a permanent form of government following the enactment of Title 2, by ignoring recommendations to change the government following a government reform convention in 2002, and by thwarting the People's decision following the Dec. 15, 2009, initiative special election to reduce the size of the Council.

"By their actions, the Speaker and the Council failed to keep the promises made to the People in CD-68-89 when the Title 2 Amendments were made and failed to carry out the People's mandate," the Court said.

In its first and most lengthy ruling in the case of *Shirley v. Morgan*, the Court affirmed the Window Rock District Court's decision that declared placing the President on leave as "null and void" and "unenforceable."

That 47-page decision also considered the Council's January 2010 legislation to prevent Navajo courts from using *Diné* Fundamental Law in deciding cases as it has since 1958.

"Words are sacred, and the Navajo people have the right to keep the Navajo Nation Council to the whole of its words, not simply a portion thereof."

– Navajo Nation Supreme Court
Shirley v. Morgan, May 28, 2010

"The Council has become so intransigent in its position that it now purports to have authority to enact a new statute that would reduce the discretion of our courts to question the sources and complexion of our laws and governmental authority," the Court wrote.

As a preliminary matter, the Court said Navajo courts would not "become entangled in the political maneuvering that we and the People are now observing. The courts will take its proper role – that of an independent decision-maker which has been summoned by the branches and the People – to move this dispute forward and bring it to an end with a final resolution."

In doing so, and in finding that the Supreme Court had jurisdiction to hear the case despite the Council's argument to the contrary, the Court found that "checks and balances is a fundamental principle of a government of separate functions that may not be abridged by the Council."

Regarding the Council's Resolution CJA-08-10, *The Foundation of Diné, Diné Law and Diné Government Act of 2009*, the Court found that the Council:

- Could not claim to enact the Fundamental Laws of the Navajo People, which are immutable laws given to the People by the Holy Ones.

- Could not have Fundamental Laws mean whatever the Council says it means – changing it when the Council alone deemed necessary, and

- Could not prevent Navajo courts from using Fundamental Law in their judicial review of cases.

In passing the legislation, the Court noted that the Council made no specific findings nor mentioned any reports to substantiate its reasons.

"Without specific findings, the purpose of any government action will be questioned," the Court said.

Despite the Council's repeated denials that its recent actions had anything to do with the President's initiative to reduce its size, the Court noted the sequence of events presented a different perspective.

"We take judicial notice that the Council has publicly expressed dissatisfaction with a number of recent decisions by the courts that have gone against the Council's partisan interests, in which the courts have used Fundamental Law," it wrote. "All these cases concern the President's initiatives to reduce the size of the Council and give the President budget line-item veto."

It continued:

"The totality of the circumstances show that the Council passed CJA-08-10 with the purpose of controlling the type of law that is used in the courts due to the negative impact the use of traditional laws have had on the Council's partisan interests in recent court decisions. Such partisan use of legislative power is an impermissible legislative purpose that, furthermore, violates the doctrine of separation of powers. The Council may not encroach upon the independence of the Judicial Branch. While a complete and total separation of powers is not possible, encroachment by one branch into the essential powers of another for any reason is impermissible."

In the Governmental Structure section of the opinion, the Court noted that the ideal Navajo Nation government "is oriented toward the public interest and recognizes fully that the power to govern comes from the People, *Hózhóóji dóó Hashkééji*."

The Speaker and Council had asserted that the Council is the absolute source of governance for the Navajo People, that there is nothing indigenous about the three-branch government, and that traditional laws of the Navajo People have no relevance in modern governance, the Court said.

"We were startled by this argument, and we were amazed that our own leaders would make such an argument," Navajo Nation Supreme Court Chief Justice Herb Yazzie told an audience of about 150 who came to the Navajo Nation Veteran's Memorial Park to hear the decisions announced.

He said it was surprising to hear that legislative leaders believe that the government they have been entrusted with really is not a *Diné* government, and that *Diné* values, principles, laws, tradition and culture have nothing to do with the government structure.

"This shows disrespect for oneself as a *Diné* individual," Chief Justice Yazzie continued. "It also shows disrespect for the People that entrusted them for the operation of the government, this government, that they say is simply copied from somewhere else. We were startled, and therefore we said we must be blunt in our response to that."

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At the conclusion of its opinion in *Shirley v. Morgan*, the Court exhorted those lawyers "to seek out knowledge by going among our *Diné* People and experiencing the *Diné* way of life first-hand."

The Court also found that the legislation to place the President on administrative leave was not an emergency although designated as such by the Speaker.

"Apparently, the Council routinely uses the emergency legislation exception for all manner of legislation that ought not to qualify as emergency legislation, which enables a bypassing of the statutory committee(s) review and approval process," the Court found. "We state uncategorically that such misuse of the emergency legislation procedural exception is impermissible."

It noted that emergencies are the cessation of law enforcement, disaster relief, fire protection or other direct services required as an entitlement under Navajo or federal law, or which directly threaten Navajo Nation sovereignty.

It said that the Council's process of placing the President on leave "is notable for secrecy, haste, disregard for persuasive Navajo Nation legal authority, and the shabbiest of shabby treatments of the President, both individually and in his Office, in violation of the fundamental principle of *k'e*."

The Court said that injunctions or restraining orders, rather than the temporary removal of a President, would have sufficed to protect documents needed in an investigation. It said of all governmental offices, the President alone has a direct relationship with the People, deals with other sovereigns on their behalf, and is the face and embodiment of the Nation.

Removing the President in such a fashion denied the People of their leader and "it is the right of the People to choose their leaders," the Court found.

"As we have stated throughout this opinion," the Court said, "the People have a right to participate in their government processes, to challenge government action, to express their views, and to have a meaningful voice in what form their government will take."

In its second opinion, *Nelson v. Initiative Committee*, the Court ruled that the Navajo People have sole authority to change the size of the Navajo Nation Council, and that the Council may not amend Title 2 in an attempt to prevent that from occurring but must defer to the will of the People.

The 27-page opinion cited its earlier ruling about *Diné* Fundamental Law, stating "Our Fundamental Laws are the immutable foundational laws of the Navajo Nation and may only be acknowledged, not enacted, by the Council. It purports to insulate itself from judicial review, which is an abridgement of the principle of checks and balances."

The Court found that the dismissal of Timothy Nelson's grievance by the Office of Hearings and Appeals was proper because he filed against the wrong party – the Initiative Petition Committee – and failed to include the indispensable party – the Navajo Election Administration – which actually conducted the election.

It said that the Council's acknowledgement of *Diné bi beenahaz'danii* provides guidance on the subject of leadership and established that the People's right and freedom to choose their leaders.

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"The People's laws are superior to the statutory laws enacted by the Council, and the referendum/initiative processes are modern acknowledgments of this authority," the Court said.

It also found that an initiative may pass by a simple majority vote. It said that the supermajority vote requirement "is an extraordinary majority impossible to be attained judging from voter turnout in any previous Navajo Nation election."

"The initiative/referendum process is intended to give the *Diné* a voice in their government, and the initiative/referendum law must be read liberally to achieve the purpose of the legislation and not to frustrate the intention to give a voice to the *Diné* in their government," the Court said.

"The Council has a duty to act on the People's recommendation," the Court stated in its earlier ruling. "If the Council refuses to act, it is not inappropriate for other governmental entities to press the People's interests and hold the Council to its promises made in Resolution CD-68-89."

The Court said the supermajority requirement "cannot be used to circumscribe the People's will. While the Council may limit itself in creating laws, it cannot limit the *Diné* when they are attempting to address the structure of their governing system."

The Court ruled that the Council has no independent authority "to alter or abolish its clear deference to the Navajo People."

"We affirm today that the Council may not use its power to frustrate the will of the People."

To download the Court's opinions, go to www.navajocourts.org